No. 16040

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT S. CRAIG, *et al.*,

Appellants,

vs.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellee.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

OPENING BRIEF ON BEHALF OF PLAINTIFF APPELLEES-APPELLANTS.

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TABLE OF AUTHORITIES CITED

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I.

Statement of the Case.

As part of their statement of the case, Plaintiffs adopt, as representative of all causes, the Findings of Fact and Conclusions of Law in Cause No. 1314-57 [R. 44, *et seq.*], excepting only those paragraphs, Paragraph VIII of the Craig Findings, for example [R. 47], which state that Defendant's failure to compensate for employment in excess of forty (40) hours in a workweek at one and one-half times the regular rates was in good faith, together with the consequent failure of the trial court to assess liquidated damages or to include such liquidated damages in determining the attorney's fee.

Evidence Relating to Defendant's Failure to Pay Time and a Half for Excess Hours.

The payroll records of Defendant set forth flat hourly rates and payments based thereon with no consideration given to overtime hours [Deft. Exs. A through J, incl.]. Defendant did not ask for or obtain a ruling from the Department of Labor or any other governmental agency establishing the exempt status of Plaintiffs [R. 266]. Defendant never made any inquiry of any federal agency as to the possible exempt status of Plaintiffs [R. 267]. Defendant, through Hans S. Bamberger, its President, was aware of existing regulations [R. 266].

Facts Relating to the Order Directing Release of Attached Funds in Excess of Judgments, and the Misconduct of Defendant and Its Attorney in Relation Thereto.

All directly involved facts are contained in the affidavit of William Kraker accompanying the Notice of Motion to Set Aside Order Directing Release of Funds in Excess of Judgments, to Hold Julius A. Leetham in Contempt, and for Attorneys' Fees [R. 71-76, incl.], to which *in toto* the Court's attention is directed.

II.
ARGUMENT.

1. In the Absence of Any Showing by the Employer of Both Good Faith and Reasonable Grounds Therefor, an Award of an Equal Amount of Liquidated Damage Is Mandatory.

Section 16(b) of the Fair Labor Standards Act of 1938 (29 U. S. C. Sec. 216(b)) provides:

> "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . ."

Under this provision the courts have held that the liability of an employer for liquidated damages equal to its underpayment of required wages is fixed at the time it fails to pay such wages when due, and the courts had no discretion to relieve it of any portion thereof. (See *Brooklyn Savings Bank v. O'Neil,* 324 U. S. 697 (1945); *Overnight Motor Transp. Co. v. Missel,* 316 U. S. 572 (1942).)

A partial and conditional relief from this liability was provided for by the enactment of Section 11 of the Portal-to-Portal Act of 1947 (29 U. S. C. Sec. 260), which states:

> ". . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act."

The conditions of relief from the liability for liquidated damages are spelled out in an Interpretative Bulletin, General Statement as to the Effect of the Portal-to-Portal Act of 1947 (29 C. F. R. Part 790.22(b)(c); 29 U. S. C. App. Sec. 790.22(b)(c)):

> "(b) The conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) the employer must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. If these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. This may be done in any action brought under section 16(b) of the Fair Labor Standards Act, regardless of whether the action was instituted *prior to or on or after* May 14, 1947, and regardless of when the employee activities on which it is based were engaged in. If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages.
>
> "(c) What constitutes good faith on the part of an employer, and whether he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act are mixed questions of fact and law, which should be determined by objective tests. Where an employer makes the required showing, it is for the court to determine in its sound discretion what would be just according to the law on the facts shown."

In its failure to pay overtime compensation at one and one-half the regular hourly rate, Defendant relies solely on the asserted exempt status of its employees as employed in a bona fide executive, administrative, or professional capacity under Section 13(a) of the Fair Labor Standards Act (29 U. S. C. Sec. 213(a)). However, the regulations defining the terms "executive," "administrative" and "professional," for the purpose of exemption in each instance, require for inclusion within the definition that the employee be compensated on a *salary or fee basis.* (See 29 C. F. R. Part 541, Secs. 541.100, 541.200, 541.300; 29 U. S. C. App. Secs. 541.1, 541.2, 541.3.)

All Plaintiffs were compensated at an hourly rate. Such employees are clearly not included within the definitions of the above regulations. Defendant was aware of these regulations [R. 266]. Yet, despite the significant language difference, it nonetheless did not ask for a ruling; indeed, Defendant never even made any inquiry of any federal agency as to the possible exempt status of Plaintiffs [R. 266-267]. Not only did Defendant not have reasonable grounds for its conduct, but it necessarily also did not have good faith.

Under the circumstances present here, Defendant could be relieved from the assessment of liquidated damages only if it had obtained an erroneous written ruling, or erroneous written approval, from the Wage and Hour Division. (See Sec. 10 of the Portal-to-Portal Act, 29 U. S. C. Sec. 259.)

2. **Under the Rules of Procedure, the District Court Erred, Both in Making Its Order Directing Release of Attached Funds in Excess of Judgment, and in Failing to Set It Aside.**

As stated in the Affidavit of William Kraker [R. 72], Plaintiffs' counsel never received the required notice of either the Application for Order Directing Release of Funds or the Order made thereon. (See Rule 5(a), So. Dist. Calif. Local Rules 3(b), 7(a).)

Further, defendant failed to file any instruments or memorandum of points and authorities in opposition to Plaintiffs' motion to set aside said order. Under Southern District California Local Rule 3(d), such failure is deemed to constitute a consent to the granting of said motion.

Still further, Plaintiffs' counsel has never received any notice of the Minute Order denying said motion.

3. **Misconduct of Defendant and Defendant's Attorney Is Established, Not Only in Connection With the Sworn Application for the Order Directing Release of Excess Funds, but Also Both Prior and Subsequent Thereto, and Including Misrepresentations at the Hearing on the Motion to Set Aside Said Order.**

The facts relating to the misconduct culminating in the obtaining of the Order Directing Release of Attached Funds in Excess of Judgment are set forth in the affidavit of William Kraker [R. 71-76, incl.].

Regarding prior matters, attention is called to Plaintiffs' Brief and Memorandum in Opposition to Motion to Set Aside Defaults, particularly paragraph IV, wherein it was established that Mr. Leetham and/or Mr. Bamberger were deceiving the Court [R. 34-36], and to Plaintiffs'

Brief in Opposition to Motion to Dismiss Under Rule 37(d), Federal Rules of Civil Procedure, in the *Gindes* case, and the accompanying affidavits, wherein it was established that defendant, by Mr. Mayer, its Secretary-Treasurer, indulged in a bald-faced perjury [R. 103-108].

Mr. Leetham's counter-affidavit to the Motion to Set Aside the Order Directing Release of Excess Funds is so utterly improbable as to be unbelievable. In his counter-affidavit he asserts that the dealings on April 2, 3 and 4, 1958, were initiated by William Kraker [R. 80]. He also states [R. 81]:

> "The following day, April 3, 1958, Mr. Kraker appeared in your affiant's office with the document which appears as Exhibit 'A' to the Application for Order Directing Release, etc., filed April 7, 1958 (to which reference is made and the same is herein incorporated). Mr. Kraker stated that he had carefully computed the same to include principal, interest, attorney's fees, and costs, less deductions."

At the hearing on the motion Mr. Leetham again asserted:

> "No one has denied that the calculations were made by plaintiff."

The above constitutes deliberate misrepresentations by Mr. Leetham, for the initial contact and the initial calculations were necessarily made by him. For example:

(a) William Kraker could not have made the exact computations without Mr. Leetham having first given him the figures, for a Schedule of Deductions from the judgments were, in accordance with the judgments, to be furnished by Defendant. This Schedule was served on Kraker in Mr. Leetham's office after Kraker had already pre-

pared Exhibit "A" [R. 61-63, Plaintiffs' Conditional Order to Release directed to Marshal]. This Schedule was prepared by Mr. Leetham and is dated April 2nd. Thus, Mr. Leetham must have given Kraker all the figures before Kraker appeared in Mr. Leetham's office.

(b) Mr. Leetham must have contacted the Bank of America on April 2nd, and probably prior thereto, and gotten in touch with Kraker thereafter—in order for said Exhibit "A" to have been drawn up.

(c) In the sworn Application for Order Directing Release of Funds itself the fact is unmistakable that Mr. Leetham had a very impelling reason for initiating a release of excess funds [R. 60-61]:

> "The attached amounts above and beyond the amounts of the judgments have been pledged to the Director of Internal Revenue, who states that tax liens will be levied against the defendant unless the same is paid on Monday, April 7, 1958. . . ."

4. There Is No Merger of an Attachment Lien of Personal Property in a Judgment Lien.

> "In the case of personal property, the recording of an abstract of judgment has no effect, i.e., a judgment lien only covers real property. Hence the attachment lien is not merged and remains. (Balzano v. Traeger (1928), 93 C. A. 640, 643, P. 249.)"
>
> 1 *Witkin,* Cal. Proc., Sec. 82, Judgment for Plaintiff, p. 916.

> "The doctrine of merger of attachment and judgment liens applies only to cases where real property has been attached, since a judgment does not become a lien upon personal property although it has been attached. In such a case, the attachment lien con-

tinues after judgment to preserve the lien and its priority and to allow the issuance and levy of execution under the judgment."

6 *Cal. Jur.* 2d, Sec. 135, Merger of Lien and Judgment, p. 44.

5. Setting Aside of the Order Will Effect the Result to Which Plaintiffs Are Entitled Only if the Court Requires Mr. Leetham to Deposit Into Court an Amount of Money Equal to the Amount Heretofore Released.

The basis of plaintiffs' appeal is the failure of the trial court to assess defendant an equal amount in liquidated damages, or an additional $6,760.16. (This figure does not include a duplication of court costs.) Since this is a penalty rather than wages, plaintiffs are entitled to the entire amount without deductions for any payments for taxes, etc., to be made directly by defendant. Thus, plaintiffs are entitled, in addition to the $5,366.33 on deposit in court, to the further security of $6,760.16, and interest thereon from March 24, 1958, and interest from March 24, 1958 on the $5,366.33 on deposit in an amount sufficient to cover the period of appeal, plus costs and attorneys fees on appeal. These figures total, conservatively, an additional $9,000.00. The amount released from attachment pursuant to the Court's order is approximately that amount.

It definitely appears that defendant is now insolvent and would be unable to respond to a new attachment restoring plaintiffs to their previous security, either in total amount or in priority. Because the impairment of plaintiffs' rights was occasioned by Mr. Leetham's misconduct, it is only appropriate that the Court require Mr. Leetham personally to deposit into court at least $9,000.00 so as to restore plaintiffs to their original secured position.

The Court has the power to make this requirement of Mr. Leethm under Rule 60(b), which states:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

6. Defendant's Acceptance of the Benefits of Exhibit "A", the Conditional Order to Release, Constitutes a Waiver of Its Right to Appeal.

Exhibit "A" [R. 61-63] is referred to as Exhibit X in the affidavit of William Kraker setting forth all the circumstances relating to it [R. 71-76], wherein it is stated [R. 74] that Exhibit "A" (which is only a copy) was conditionally delivered to Mr. Leetham, one of the conditions being Defendant's acceptance of the various judgments. Mr. Leetham in his sworn Application for Order Directing Release of Funds in Excess of Judgments and Directing Deposit of Funds in Registry of Court Pending Satisfaction, admits at least this much [R. 60]: that Kraker would not proceed in the manner contemplated (via Exhibit "A") unless Defendant spelled out its surrender of its right to appeal. Nonetheless, while refusing to spell out Defendant's surrender, Mr. Leetham acted on Exhibit "A" and obtained a court order thereon. By Mr. Leetham's action Defendant has accepted certain benefits. That the benefits are substantial appears from Mr. Leetham's aforesaid sworn Application [R. 60-61]. It is hornbook law that the acceptance of substantial benefits necessarily waives the right to appeal.

Conclusion.

It is submitted that Plaintiffs are each entitled to an additional equal amount in liquidated damages, and that Mr. Leetham be required to respond personally to the extent that Defendant may be unable to satisfy the entire amounts of the judgments as they may finally be determined.

Respectfully submitted,

WILLIAM KRAKER,

Attorney for Plaintiffs.